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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

DOUYON, LORNA M

ART UNIT	PAPER NUMBER
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1751

DATE MAILED: 04/10/2002

8

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/904,831

Applicant(s)

METTRIE ET AL.

Examiner

Lorna M. Douyon

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 23 January 2002.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 30-34 and 36-71 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 30-34 and 36-71 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

## Attachment(s)

- 15) ☐ Notice of References Cited (PTO-892)
- 16) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 17) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 18) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 19) ☐ Notice of Informal Patent Application (PTO-152)
- 20) ☐ Other: \_\_\_\_\_

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1. This action is responsive to the amendment filed on January 23, 2002.
2. The cancellation of claim 35 is acknowledged. Claims 30-34 and 36-71 are pending.
3. The rejection of claim 36 under 35 U.S.C. 112, second paragraph is withdrawn in view of applicants' amendment.
4. Claims 30-34 and 37-71 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Dubief et al. (US Patent No. 5,700,456), hereinafter "Dubief" in view of *International Cosmetic Ingredient Dictionary* for the reasons set forth in the office action in paper number 6.
5. Claim 36, which is a duplicate of canceled claim 35, stands objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Response To Applicants' Arguments***

6. Applicant's arguments filed on January 23, 2002 have been fully considered but they are not persuasive.

With respect to Dubief in view of *International Cosmetic Ingredient Dictionary*, Applicants argue that the office's rejection is improperly predicated on selecting and combining

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isolated teachings from Dubief when the reference itself provides no motivation for the combination. Applicants also argue that Dubief's only dyeing example (Example 6) is already in thickened cream form. Applicants also argue that Dubief, while disclosing thickeners as possible ingredients, teaches that its oxidative dyeing compositions do not require additional thickening agents. Applicants also argues that the Office urges that a reference is not limited to working examples, and this may be so, but the remainder of the reference provides no motivation or guidance to modify its teaching. Applicants finally argue that Applicants' invention is reached only by employing impermissible hindsight.

The Examiner respectfully disagrees with the above arguments because the teachings of Dubief provide sufficient motivation for the combination. Dubief, teaches hair treating compositions, one of which is for the oxidation dyeing of hair (see claim 17, col. 19, lines 18-21), wherein the composition comprises at least one cationic polymer (see abstract) and thickening agents like NATROSOL PLUS (see col. 8, lines 36-45). As already stated in the office action in paper number 6, even though Dubief does not exemplify the use of cetyl hydroxyethylcellulose in his two-part oxidative hair dye composition in Example 6, a reference is not limited to working examples, see *In re Fracalossi* 215 USPQ 569 (CCPA 1982). The fact remains that the compositions of Dubief, which can also be used for the oxidation dyeing of keratinous fibers (see col. 9, lines 18-20) can contain thickening agents such as NATROSOL PLUS (see col. 8, lines 36-45), which is cetyl hydroxyethylcellulose. Accordingly, with these teachings, a person of ordinary skill in the art would be motivated to incorporate cetyl hydroxyethylcellulose into the

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composition of Dubief for use in oxidation dyeing of keratinous fibers. In addition, all disclosures of the prior art, including non-preferred embodiment, must be considered. See *In re Lamberti and Konort*, 192 USPQ 278 (CCPA 1967); *In re Snow* 176 USPQ 328 (CCPA 9173) Also, Applicants have not provided any showing of criticality with NATROSOL PLUS. In response to applicants' argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

7. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

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however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lorna M. Douyon whose telephone number is (703) 305-3773. The examiner can normally be reached on Mondays-Fridays from 8:00 AM to 4:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Yogendra Gupta, can be reached on (703) 308-4708. The fax phone number for this Technology Center is:

**(703) 872-9311** - for Official After Final faxes

**(703) 872-9310** - for all other Official faxes.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Technology Center receptionist whose telephone number is (703) 308-0661.

April 8, 2002

*Lorna M. Douyon*  
Lorna M. Douyon  
Primary Examiner  
Art Unit 1751